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MDI report: severity of malpractice injuries sets record in 2002, but victim payments don't keep pace

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Public Policies serves as a key communications link between MDI and Missouri's legislators, weekly and broadcast media, industry observers and trade associations.

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Cases involving patient deaths increase 50 percent

Severity of patient injuries reached an all-time high for medical malpractice payments in 2002, but victim awards have not kept pace with inflation and increasing disabilities, the Missouri Department of Insurance (MDI) reported.

In its 2002 annual medical malpractice report, MDI noted:

— For the first time, the typical medical malpractice claim payment involved at least permanently disabling injuries, based on insurers' own evaluations of paid claims. Successful claims against physicians involved even more damaging injuries, again reaching unprecedented severity levels.

— The 566 paid claims in 2002 involved 205 patient deaths – a 49 percent increase from 2001 and 68 percent from 2000. Such deaths accounted for more than one-third of claims.

— Permanent injury or death was involved in two-thirds of claim payments.

— As a result, average claim payments – after declining in 2001 – rebounded to the record levels earlier reached in 2000 and 1996, particularly on claims against physicians. Average payments in deaths rose from $194,067 to $254,944. Patients lived, but suffered permanent injuries in another 170 cases, which had average awards rise from $242,100 to $291,079.

— Nevertheless, the report showed average claim payments continued to increase at a slower rate than the combined effects of medical inflation (84 percent), wage inflation (55 percent) and injury severity (a full-step increase in physical disability), which are the principal factors in awards.

Payouts on closed claims reached $108.7 million, compared to a previous high of $76.9 million in 1996 for licensed insurers. Another $26.3 millon was paid in unlicensed, alternative markets. For reasons unknown, insurers began settling more cases, making payments on 12 percent more claims in 2002 and boosting overall totals.

An MDI statistical analysis found that despite the increasing size of awards, victims actually were receiving less generous payments

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than in the past. That analysis found Missourians should have expected larger awards in 2002 if they had kept pace with increasing medical costs, wages and injury severity since 1990.

On the issue of injury severity, Gov. Bob Holden has appointed a 17-member Missouri Commission on Patient Safety, which began meeting in October to recommend ways to reduce the incidence of medical errors. The panel already has met three times and scheduled daylong sessions twice a month through May to investigate how to reduce unnecessary patient injuries.

Severe loss of capacity characterizes Missouri's malpractice market

Scott Lakin, director of the Missouri Department of Insurance, said two years of sudden turbulence in the Missouri market – because of national insolvencies and withdrawals – made analysis of trends very difficult.

Before 2002, Missouri's data indicated no significant problems with the malpractice market that were not common to most lines of property and casualty insurance.

But between August 2001 and May 2002, Missouri's malpractice insurance market lost 57 percent of its capacity to write new business because of two major insolvencies, the withdrawal of two other major carriers nationally and a moratorium on new business by the state's largest writer.

"The loss of capacity to write new business came on the heels of a long period of intense price competition when, insurers agree, they had substantially underpriced their product for physicians. In hindsight, the current wave of large price increases and difficulties in finding any coverage was predictable, but not preventible," said Lakin, referring to Missouri's legal reliance on competition to regulate malpractice and other commercial insurance rates.

"We have been extremely frustrated because malpractice carriers leaving Missouri have stressed that the state remains a good place to conduct insurance business. They uniformly have cited losses elsewhere in their decisions to stop writing malpractice coverage. Insurers across the country simply have little interest now in expanding into medical malpractice in any state, and increased competition is essential to stabilizing our market."

In the critical area of physicians, five insurers with 30 percent of Missouri doctors' business in 2002 are withdrawing, sometimes gradually, from the national medical malpractice market, and another with 25 percent of the Missouri market has a moratorium on new business.

The latest withdrawal from the Missouri market, to begin in March 2004, involves Farmers Insurance Group, which paid losses of only $7,500 and expects future payments of less than $1.2 million on $20 million in premium earned in 2002. Farmers executives assured MDI that their decision to withdraw nationally was not based on any problems in the Missouri market.

Mixed messages from Missouri market

Even in the area of competition, the Missouri market has sent mixed messages.

Missouri surprisingly has licensed seven new medical malpractice carriers since Jan. 1, despite continuing reluctance of insurers nationally to add such risks. These new firms usually need considerable time to reach full marketing strength, although one startup insurer has sold several million dollars of coverage this year. With the Farmers withdrawal, Missouri has nine malpractice carriers accepting new applicants.

"Hard markets" – in which insurance is increasingly expensive and more difficult to obtain – tend to find more policyholders searching for coverage from typically expensive alternative markets, which are typically expensive, largely unregulated "surplus lines" carriers and risk retention groups.

But the share of Missouri's malpractice business conducted in alternative markets fell from 18.4 percent in 2000 to 13 percent in 2002. The dollar value of surplus lines' earned premium actually fell in 2002.

Other factors that counter popular misconceptions about medical malpractice insurance included:

— While claims payouts surpassed previous levels, those amounts accounted for the smallest percentage of premiums written since 1995 – largely because licensed insurers have raised rates substantially amid dwindling competition. Licensed insurers paid out 63.2 percent of the premiums they wrote during the year, com-

*(See **malpractice**, p. 4)*

Insurers refund $1 million to 11,000 Missourians for errors found by state exams

Three major insurers have completed $1 million in refunds to more than 11,000 Missouri policyholders and 39 health-care facilities for errors detected in MDI market conduct examinations.

"These mistakes were the type that no consumer likely would have found and brought to the attention of either the company or the department through the normal complaint process," said Scott Lakin, the department director. Involved were:

· $334,369 that State Farm Insurance Cos. repaid to 127 policyholders or claimants. Those individuals had been injured in auto accidents, but some medical expenses were disallowed on the recommendations of an outside company, MedView, retained by State Farm. The insurer, however, could not show that a licensed physician or chiropractor had reviewed the claims before the denials were made. The practice had been the subject of a "Dateline NBC" segment.

· $317,769 that Shelter Insurance Cos. repaid to 6,238 policyholders who were overcharged on their auto insurance premiums. The policyholders had paid higher premiums for comprehensive and uninsured motorist coverage because of accident and driving history, but such surcharges on auto policies are prohibited by state regulations. Comprehensive coverage protects auto owners against physical damage from vandalism and acts of God, such as weather and non-collision road hazards, that have no relationship to accident history.

· $345,577 that Humana Health Plan Inc. refunded to 39 health-care providers and 4,647 policyholders in the Kansas City area. The state market conduct exam found that Humana had improperly calculated co-payments and deductibles; amounts it owed when other insurers or programs were involved; and payments by an outside mental-health contractor. The errors involved business group policyholders as well as Missouri Consolidated Health Care Plan members, who are state or local government employees.

Unlike audits of insurers' financial conditions, the market conduct examination unit focuses on patterns of business practices, generally related to claims handling and premium calculations, that violate state laws and regulations.

Such examinations usually are targeted at insurers with large volumes of Missouri business or suspect consumer complaint records. The U.S. General Accounting Office (GAO) last month cited Missouri for having the only market conduct program in the nation based on formal analysis of insurers. (Two other states have just started similar approaches of selecting companies for market conduct exams.)

If violations are found, MDI can fine the companies and require refunds for consumers, giving them an incentive to avoid making future mistakes.

So far, in 2003, MDI's market conduct unit has required the refund of more than $2 million to Missouri consumers.

Last year, companies examined paid $1 million in fines for violating state insurance market conduct laws with more than $600,000 paid so far in 2003. The fines collected hold companies accountable and are used to support Missouri's public schools.

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pared to a high of 86.5 percent in 1998, when the medical malpractice business was considered highly profitable for insurers.

— Damages suffered by victims for lost wages and extra medical bills continued to outpace non-economic or "pain-and-suffering" damages, which compensate victims for non-monetary losses like death of a spouse or inability to have children. Economic damages accounted for 53 percent of total awards in 2002. For example, the state's largest writer reported $11.5 million in economic awards and $3 million in non-economic damages paid in 2002. Since 1996, economic damages have outpaced non-economic awards, in contrast to the early 1990s.

— Awards of $1 million or more dropped to six in 2002, compared to eight in 2001 and a high of 11 in 1996. Two Missouri cases yielded multimillion-dollar awards, including all kinds of damages, compared to five in 1996. The largest Missouri award in 2002 reached $8 million – all of it in economic damages for the patient's lost income and increased treatment costs. In cases involving doctors and most individual providers, insurers usually do not pay judgments over $1 million because of policy limits.

— The year produced little evidence to substantiate insurers' fears about the effect of the January 2002 Scott v. SSM Healthcare court ruling, which allows multiple non-economic damage caps when several incidents of malpractice result in a single injury. Previously, Missouri limited awards to $547,000 per injury, adjusted annually (to $557,000 in 2003). Insurers identified 11 cases that exceeded the old cap in Missouri by $2.5 million or 1.9 percent of total losses in the state.

— Patients have become more successful in winning lawsuits filed against physicians, which typically involve the greatest damages, although doctors still win two of every three lawsuits. In 1998, patients won only 22 percent of lawsuits, but that figure rose to 33 percent by 2002.

New claims, projected losses increase in 2002

New claims filed and losses incurred in 2002 provide insights into potential future costs of the state medical malpractice system, although these projections are far more speculative and possibly misleading than data on actual paid losses.

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Cut in workers compensation tax will save employers more than $12 million

Gov. Bob Holden announced that the administrative tax on Missouri workers' compensation insurance premiums will drop 50 percent in 2004, saving employers more than $12 million.

The administrative tax will decline to 1 percent of premiums next year, and the surcharge that funds benefits from the Second Injury Fund will remain at 4 percent.

"This administration is committed to working with the business community to reduce workers' compensation costs while maintaining the integrity of the workers' compensation system," Holden said.

Renee Slusher, an official of the Missouri Department of Labor and Industrial Relations (DOLIR), said reorganizations in her office as well as larger tax pool, because of an increase in premiums, have allowed the department to make the cut in the tax. Reorganization efforts include increased use of electronic filings and reduction of state positions. The administrative tax funds department operations.

"By streamlining our state operations, we are able to help improve the business climate for Missouri employers and continue to provide needed services to those who depend on the workers' compensation system," Slusher said.

State law requires the director of DOLIR'S Division of Workers Compensation to determine the administrative tax rate for the following calendar year, based on projected expenditures.

The revenue from the Second Injury Fund surcharge pays benefits to injured workers who had previous disabilities. The amount of surcharge must be adequate to cover payments from the fund during the calendar year.

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Team of the Quarter – surplus lines

Leslie Dewey, Lillian Hand, Henrietta Pryor and Nicole Wilbers conduct surplus lines examinations on licensed surplus lines brokers.

They reconcile broker accounting records to the state filings. During an examination they look for any violations of regulations, educate the brokers and ensure that all money collected is paid.

They each find working with people outside MDI the most challenging and interesting part of their jobs. Also, the travel, keeping current on legislation and market trends make their jobs rewarding.

Betty Kay Christian, the section supervisor, said, "This team processed and reconciled more surplus lines filings and tax reports representing policy procurements and monetary transactions during the 2002 tax year than ever before. They reviewed, evaluated, and coded over 45,000 reported transactions. The 5 percent premium tax collected for 2002 tax year was $18,950,503. They also are responsible for doing annual reconciliation of tax reports, on-site field examinations and reconciling carrier production reports against our database."

Christian added, "The team must cooperate with each other to ensure that the review process of the procurements, the reconciliation process and the collection of taxes are completed. There is no area of responsibility that can operate without the other. Each member is willing to assist the other to get the job done and they must always be on the watch for better ways to more efficiently and effectively do their job."

Leslie Dewey has been with the department for more than two years. She's challenged by working with people outside the office who are not always cooperative. Dewey likes working with a wide variety of people in the field and wants to continue developing new skills. She enjoys hiking, crafts and photography.

Lillian Hand has more than 20 years experience in the accounting field. Hand has two daughters and two granddaughters and enjoys gardening, redecorating, crocheting and golf.

Henrietta Pryor has been with the department for seven years in this same position. Pryor began her insurance career in 1973 with Safeco Insurance Co. She and her husband, John, have two daughters, Julie and Johanna, and three grandchildren.

Nicole Wilbers has been with the department since February 2001 and came to surplus lines in July 2002. She enjoys the people she works with and talking to brokers all over the U. S.

Wilbers has learned valuable computer and math skills and the laws for surplus lines requirements. Wilber's goal is to learn more about surplus lines insurance. Wilbers enjoys spending time with Zach, her 16-year-old son; Brittany, her 12-year-old daughter; and Jack, her companion of two years. She also loves riding her motorcycle.

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The number of claims filed rose slightly for medical malpractice overall and for physicians, although hospitals saw a continuation of their 12-year decline in claims. Overall, claims filed rose 1.8 percent, from 1,469 in 2001 to 1,496. For physicians, claims increased from 663 to 703, or by 6 percent.

Claims filed are still well below the records set in 1996. Then, 1,976 claims were filed overall, or almost 500 more than in 2002. Among physicians, the 703 new claims reported in 2002 was 31 percent below the peak of 1,025 in 1996 and 26 percent below the number in 2000.

Lakin said the repeated mention of medical malpractice in the media may account for the slight uptick in claims. "National studies indicate that few instances of medical malpractice actually result in claims. No one should be surprised that, with widespread media coverage of the medical malpractice issue, a few more injured parties are exploring and pursuing claims," Lakin said. "This same phenomenon occurred in 1985 and 1986, when the last malpractice crisis peaked."

Despite major increases in premiums for coverage last year, the state's licensed malpractice insurers still projected they would lose money on payouts — up to 8 percent overall and 17 percent on physician policies – for business written in 2002.

Licensed insurers wrote 17.5 percent more in premiums in 2001 and 58 percent more in 2002 than previous years. For physicians, premiums written

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MDI Regulatory Actions

October 2003

Legal action - agents, agencies, brokers, companies

Chicago Title Insurance Co., Chicago, IL, $1,500 forfeiture for failure to acknowledge a claim, to complete investigation of a claim and to follow up with a claimant on an investigation.

Mutual Benefit Assessment Corp., Decatur, AL, certificate of authority suspended as a third party administrator (TPA).

Rodney T. Dahlhauser, Overland, MO, license refused.

Ryan Dotson, Columbia, MO, license refused.

Robert Sharpe, Knoxville, TN, license refused.

Financial Exams

American Life and Health Insurance Co., Mission Viejo, CA.

Cambridge Life Insurance Co., Mission Viejo, CA.

Gateway Mutual Insurance Co., Liberal, MO.

Hazel Dell Mutual Insurance Co., Barnett, MO.

Osage County Farmers Mutual Aid Association, Koeltztown, MO.

Preferred Standard Mutual Insurance Co., St. Louis, MO.

Premier Health Insurance Co., Chesterfield, MO.

St. Elizabeth Mutual Insurance Co., St. Elizabeth, MO.

Company Changes

AAA Life Insurance Co., Livonia, MI, redomesticated from the District of Columbia to Michigan.

Alpha Data Systems, Inc., Dallas, TX, withdrew as a TPA.

American Surety Co., Indianapolis, redomesticated from California to Indiana.

Ben-Com Inc., Philadelphia, PA, changed its name to ***Progeny Marketing Innovations Inc.***

Bristol West Insurance Co., Philadelphia, PA, added liability and miscellaneous authority.

CIGNA Dental Health Inc., Plantation, FL, was admitted as a TPA.

Endurance Reinsurance Corp. of America, White Plains, NY, was admitted as a qualified reinsurer.

Farmers Mutual Insurance Co. of Sullivan & Adjoining Counties, Milan, MO, added liability authority.

Iowa National Travelers Life Co., Urbandale, IA, merged into ***Employers Modern Life Insurance Co.*** and ***Employers Modern Life Insurance*** changed its name to ***EMC National Life Co.***

Mental Health Network Institutional Services LP, Austin, TX, was admitted as a TPA.

Navigators Insurance Co., New York, NY, added miscellaneous authority.

Old Republic Minnehoma Insurance Co., Chicago, IL, changed its name to ***Old Republic Security Assurance Co.***

One Health Plan of Kansas/Missouri Inc., St. Louis, MO, changed its name to ***Great-West Healthcare of Kansas/Missouri Inc.***

Pathmark Assurance Co., Lincoln, NE, withdrew as a life and health insurance company.

Planet Indemnity Co., Peoria, IL, changed its name to ***RLI Indemnity Co.***

Podiatry Insurance Co. of America (risk retention group), Brentwood, TN, was admitted with liability authority.

Provident Indemnity Life Insurance Co., East Norriton, PA, withdrew as a life and health insurance company.

Security America Risk Retention Group, Inc., Burlington, VT, registered as a risk retention group.

Security Connecticut Life Insurance Co., Minneapolis, MN, merged into ***ReliaStar Life Insurance Co.***

Sterling Investors Life Insurance Co., Rome, GA, redomesticated from Florida to Georgia.

HB 600 revokes professional licenses for delinquent state income taxes

House Bill 600 has taken effect, requiring persons with professional licenses to file and pay their state taxes or face license revocation.

Affected under the legislation are licenses to more than 100,000 insurance producers (formerly agents and brokers) and public adjusters. (HB 600, however, does not affect bail bond agents.)

The Missouri Department of Revenue's first sampling of insurance producers and public adjusters for compliance with HB 600 produced a significant number who have failed to pay taxes and face revocation.

Individuals who receive a Department of Revenue notice about noncompliance should call that agency at (573) 751-7200 or e-mail Income@mail.dor.state.mo.us **to resolve the problem. The Department of Insurance cannot provide any assistance and will refer all contacts to the Department of Revenue.**

Licensees should review the legislation at http://www.house.mo.gov/bills03/bills/HB600.htm to comply and avoid disrupting their ability to conduct insurance business. Refer to Section 577.520 of the legislation.

Enforcement procedures of the Missouri Department of Revenue and MDI under HB 600:

- Each month the MDI will send to the Department of Revenue a file of individuals newly licensed in the previous month and licenses pending renewal in the next 61 to 92 days.
- Department of Revenue will compare this file to its income tax database and send notice to each licensees or new applicant not in compliance.
- When individuals receiving those notices have resolved any compliance issues, the Department of Revenue will issue letters to them.
- Ninety (90) days from the initial notices, Department of Revenue will advise MDI of individuals still not in tax compliance.
- Under the legislation, the Department of Insurance must order revocation of the license. The licensee must cease *all* business as a producer or public adjuster, including the solicitation of business. This order will indicate the licensee has 12 months from the date of the revocation to comply with Department of Revenue requirements for reinstatement; otherwise, the licensee will have to qualify by examination to obtain a new license.
- All individuals whose licenses are revoked must provide MDI with a Department of Revenue "certification tax compliance letter" as proof of tax compliance to reinstate the license. MDI will notify the individual by letter that the license has been reinstated and will continue to its normal renewal date.

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rose 25 percent in 2001 and 49 percent in 2002.

Few 2002 claims actually have been paid. The average medical malpractice claim is not paid until 45 months after the injury occurs – 52 months in the case of doctors. After the average claim is filed, 28 months lapse before payment occurs, with that period increasing to 32 for claims paid against physicians.

Insurers reported that the severity of patient injuries *declined* for 2002's newly filed claims.

Missouri compiles more extensive information on medical malpractice than any state, and the 2002 malpractice report has been expanded substantially to update information provided in a special report in February to Missouri Gov. Holden.

The new report includes all amendments and updates reported by insurers through mid-2003 for all previous years. For that reason, figures in earlier MDI malpractice reports are not likely to match the current version.

The Missouri 2002 annual medical malpractice report is available in its entirety on the MDI Web site at www.insurance.mo.gov. Printed versions are available for $35 each by sending checks, payable to the Missouri Department of Insurance, to the MDI Statistics Section, P.O. Box 690, Jefferson City, MO 65102-0690.

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